IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6318

WILLIE SUMPTER,

Petitioner,

against

THE WHITE PLAINS HOUSING AUTHORITY and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENT WHITE PLAINS HOUSING AUTHORITY IN OPPOSITION

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Opinions Below

The opinion of the New York Court of Appeals is reported at 29 N.Y. 2d 420, and appears in petitioner's appendix at A. 5-9. The opinion of the Appellate Division, Second Judicial Department, is reported at 36 App. Div. 2d 728, 320 N.Y. Supp. 2d 472 (A. 10). The opinion of the Supreme Court of the State of New York is reported at 63 Misc. 2d 654, 313 N.Y.S. 2d 133 (A. 11-13).

Jurisdiction

The judgment of the New York Court of Appeals was entered on January 13, 1972. The petition for writ of certiorari was filed on March 10, 1972.

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1257(3).

Question Presented

Do the Housing Authority's procedures for the rejection of an applicant comply with due process requirements under the Fourteenth Amendment of the United States Constitution?

Statement of the Case

The petitioner filed his first application for admission to the Project on February 14, 1956, and the application was completed on June 13, 1956. On August 29, 1957, a letter was sent to the petitioner denying the application because the applicant was over income. The applicant left White Plains on or about May 23, 1956, and re-applied on April 1, 1968, some twelve years later. In his first application of February 14, 1956, applicant stated that the family consisted of the husband and wife, a daughter 6 months old and a daughter 3 years old. In his application of April 1, 1968, the family consisted of the husband and a different named wife than that heretofore stated in the first application. In addition to the above, there were two daughters, one 15 years old, one daughter 13 years old, and three sons age 11, 10 and 7.

The petitioner spoke to the Housing Project Manager on June 30, 1969, regarding his application, and during this interview the Housing Project Manager informed the applicant that his criminal record would be grounds for his

ineligibility, together with the fact that he failed to comply with the residency requirements; also, that he failed to produce proof of divorce from his first wife, Ruth G. Sumpter, and failed to produce a birth certificate of his third son. The Housing Project Manager told him that there would be a meeting of the Tenants' Selection Committee on September 25, 1969, and that whatever additional information he could furnish this Committee would be considered.

On September 25, 1969, the Tenants' Selection Committee reviewed the Sumpter case and made the findings of fact based upon the documentation before it, to wit, the criminal record of the petitioner, the admission in his application that he was not a resident of the City of White Plains for four consecutive years prior to the application and for his failure to supply the information regarding his divorce from the first wife, and for failure to supply the birth certificate of his third son, and filed the same in its office as required by Section 156a of the New York Public Housing Law.

A requirement list was given to the applicant when he re-applied on April 1, 1968, clearly stating the necessary information on which the Authority would make its determination.

On September 26, 1969, the Authority sent out its formal notice of rejection based upon the personal interview of the applicant and the findings of fact of the Tenants' Selection Committee. The record was totally devoid of any request or demand by the petitioner for a hearing before the Housing Authority's Board of Review pursuant to 9 N.Y.C.R.R. 1627-7.3(b), although the petitioner was represented by able counsel at all times.

The petitioner elected to avail himself of an Article 78 proceeding (C.P.L.R.) before the Supreme Court of Westchester County. The Appellate Division, Second Judicial Department, by unanimous decision, rejected the judgment

of the Supreme Court on the law and remitted the matter to the respondent Housing Authority only for action consistent with Section 156a of the Public Housing Law. In that decision the Appellate Division, Second Department, held:

> "In our view, the administrative complications and burdens attendant upon the various housing authorities in the State preclude the rigid requirements ordered by Special Term for a 'full evidentiary hearing' in each case of rejection. Upon the oral argument of this proceeding the attorney for the *amicus curiae* New York City Housing Authority [the operations of which will be directly affected by that ruling] pointed out that at least 9,411 applications for public housing in New York City were rejected during 1970. Nothing contained in *Matter of Williams* v. *White Plains Housing Authority* (62 Misc. 2d 613, aff'd 35 A.D. 2d 965) requires a contrary holding, since that case involved the eviction of a tenant already in public housing." *Matter of Sumpter* v. *White Plains Housing Authority*, 36 App. Div. 2d 728, 320 N.Y.S. 2d 472 (2d Dept. 1971).

On January 13, 1972, the New York Court of Appeals unanimously affirmed the decision below (A-1-4). The Court pointed out that Section 156a of the New York Public Housing Law requires that an applicant be advised that he may be apprised of the reasons for his ineligibility at a personal interview.

It was held that the issue on appeal was whether the petitioner was entitled to "a full evidentiary hearing" (A-6). The Court quoted from an earlier decision in *Matter of Fuller* v. *Urstadt*, 28 N.Y. 2d 315, 318-319, involving a tenant's right to renew a lease in a Mitchel-Lama project:

> " 'Petitioners are entitled to the same treatment as other individuals who are the direct subjects of State

> action, namely, the assurance, implemented by the right to a hearing which need consist of no more than an opportunity to deny or explain, that the State has not acted arbitrarily or capriciously. The test is the limited one of arbitrariness and does not involve a full evidentiary hearing or the full scope review of administrative quasi-judicial action which must be supported by substantial evidence [citation].' "

The Court below also referred to the substantial administrative burden which would be placed upon housing authorities if a rigid requirement for a "full evidentiary hearing" were mandated.

Rejecting petitioner's attempt to rely on *Goldberg* v. *Kelly*, 397 U.S. 254, the Court of Appeals emphasized that *Goldberg* involved termination of benefits presently received by one previously found eligible for such payments.

The Court held that it has long been settled that the procedural rights appropriate in the context of the holder of a status need not be appropriate or available to one who is denied the right in the first instance.

Reason for Denying the Writ

The Housing Authority's procedures for the rejection of an applicant, do comply with due process requirements under the Fourteenth Amendment of the United States Constitution.

This Court has stated: "The very nature of due process negates any concept of inflexible procedures applicable to every imaginable situation." *Cafeteria and Restaurant Workers Union, Local 473* v. *McElroy*, 367 U.S. 886, 895 (1961). In *Escalera* v. *New York City Housing Authority*, 425 F. 2d 853, 861 (1970), the Court said that: "The minimum procedural safeguards required depend on the nature of the governmental function involved and the sub-

stance of the private interests affected by the governmental action." In the context of applicants for admission to low income housing projects, established New York State and federal due process procedures require notification of rejection, opportunity for a personal interview to learn of the reasons for rejection, and the availability of the Housing Authority's Board of Review to consider appeals by applicants who so request. In New York, these procedures are set forth in Section 156a of the Public Housing Law and in Section 1627-7.3(b) of Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York (hereinafter referred to as N.Y.C. R.R.).

State and federal case law does not require a full adversarial hearing with respect to the rejection of every application for admission to low income housing. In the *Matter of Williams* v. *White Plains Housing Authority,* 35 App. Div. 2d 965 (1970) aff'd 35 A.D. 2d 965, the Court held that a tenant must receive a full adversarial hearing *prior to eviction* (emphasis added). The *Williams* case, *supra,* however, did not involve an applicant, nor did the Court's opinion in that case consider the issue. Despite petitioner's contentions, there is a clear distinction between one who resides in public housing and whose tenancy is sought to be terminated, and another who has been rejected as an applicant for such public housing. The most basic distinction is that the applicant presently has housing and seeks entrance into the low income projects; whereas, the tenant, within the meaning of *Williams,* is one whose terminated tenancy would leave him totally without housing facilities. This distinction is supported by other cases which differentiate a request for a new status, from deprivation of a status already achieved. In New York, if a civil service employee becomes subject to disciplinary charges, a formal adversarial hearing must be conducted before any action can be taken against him; however, a person who is not appointed to such a position

is not entitled to notice or an adversarial hearing. Similarly, a liquor license cannot be canceled or revoked without formal hearing; whereas a rejected applicant for renewal of such a license is not entitled to any formal hearing. In *United States* v. *Storer Broadcasting Company*, 351 U.S. 192, 205 (1956), this Court held that a rejected applicant for a broadcasting license was not, *ipso facto*, entitled to a hearing.

Several recent decisions concerning due process requirements are clearly distinguishable from the case at bar. In *Goldberg* v. *Kelly*, 397 U.S. 268 (1970), this Court was presented with a question as to whether a state could terminate public assistance payments to a recipient without affording the opportunity for an evidentiary hearing. The Court held that a pre-termination hearing was necessary to provide the recipient with procedural due process. *Goldberg* is distinguishable from the instant case in that *Goldberg* concerns itself with termination of welfare benefits which may well represent termination of the recipient's necessaries for existence. The case at bar concerns one who has present housing and who is applying to the housing projects so as to spend less of his income on housing. A second distinction is that, at the time the *Goldberg* suit was filed, there was no requirement of prior notice or hearing before termination of financial aid; whereas, in the instant case, both Public Housing 156a and 9 N.Y.C. R.R. 1627-7.3 provide sufficient due process procedures. A third distinction, already presented, is the very basis upon which the Court in *Goldberg* actually premised its decision; this point is expressed in the opinion of Justice Brennan:

> "... The crucial factor in this context ... is that termination of aid pending resolution of a controversy of eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since the recipient lacks independent resources, his situation be-

> comes immediately desperate. His need to concentrate upon finding the means for daily subsistence in turn adversely affects his ability to seek redress from the welfare bureaucracy."

In the instant case, the petitioner, as an applicant for low income housing, does not come within the crucial factor contemplated by the Court in *Goldberg;* therefore, the full evidentiary hearing required by *Goldberg* is not required under the facts of this case. Mr. Justice Black in his dissenting opinion in *Goldberg* focused on the underlying problem of delineating due process:

> ". . . the Courts must be final interpreters of the Constitution, and this holding can provide an opportunity to slide interpereceptively in law-making. But when . . . judges use this judicial power for legislative purposes, . . . they wander out of the field of vested powers and transgress into the area Constitutionally assigned to Congress and the people. . . . It somewhat strains credibility to say that a government's promise of charity to an individual is property belonging to that individual . . ."

Another recent decision that is clearly distinguishable is *Davis* v. *Toledo Housing Authority*, 311 F. Supp. 795 (1970), where the petitioner also sought admission to public housing. That case is distinguishable from the case at bar in that the Court stated: ". . . The question of present and irreparable harm done to plaintiff in this case is by no means so clear as in the *Goldberg* case, since determination of eligibility does not automatically insure the applicant of immediate housing . . ." In *Davis, supra,* the plaintiff applicant continually demanded a hearing and the defendant Housing Authority refused to grant such a hearing. The Court granted a preliminary injunction restraining the defendant from continuing to reject the plaintiff on the question of eligibility for housing. *Davis, supra,*

differs from the instant case in that the petitioner herein never made any request for a hearing by the Housing Authority. The instant case, therefore, was not one of continual demand or request and subsequent refusal; but rather one where the applicant failed to pursue administrative relief provided by statute. The Court below expressly found this case "unpersuasive"(A-9).

The petitioner would have this Court impose a burdensome and expensive procedure upon the Housing Authorities and would seek to *needlessly* expand due process requirements to include an additional evidentiary hearing upon the rejection of every applicant. In light of existing statutory due process procedures, as set forth in Public Housing Law Section 156a and in the State's Regulation 9 N.Y.C.R.R. Section 1627-7.3(b); and in light of the absence of rulings on this particular issue, it is evident that the due process question presented in rejection of applications for low income housing, should be resolved in favor of existing procedures promulgated by the New York State Legislature. The State's legislation on this issue should not be lightly overturned or interjected with rigid requirements imposed by the Court. The notice and interview requirements as provided by Section 156a and the availability of Section 1627-7.3(b) of 9 N.Y.C.R.R. which provides for a review of appeals to the Authority Board of Review upon request, adequately fulfills procedural due process and is in accord with the latest relevant case law.

In summary, the Housing Authority's procedures comply with Due Process Clause under the Fourteenth Amendment and petitioner has failed to raise grounds that would support the issuance of a writ of certiorari to review the New York Court of Appeals' unanimous decision.

CONCLUSION

The petition for Writ of Certiorari should be denied.

Dated: White Plains, New York, April 20, 1972.

Respectfully submitted,

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